The

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THE BAR ASSOCIATION BULLETIN

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Comment on Recent Community Property Decision

By CLAIRE T. VAN ETTEN, *Attorney at Law*
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Among the late decisions of the California Supreme Court respecting the effect of the more recent amendments to our Community Property Laws, the opinion in *Estate of Drishaus*, 72 C. D. 286, (decided in bank September 16, 1926), furnishes an interesting and instructive illustration of the Court's attitude toward attempts at retroactive legislation as typified in such amendments.

The specific point involved was the constitutionality of C. C. 164 as amended in 1923. Prior to 1917 that section read, as far as is material to discussion of this case, as follows: "All other property acquired after marriage by either husband or wife or both is community property."

Under this provision it was uniformly held that property acquired while the parties were domiciled in another state and which was in effect the separate property of the husband, where so acquired, remained separate property when brought into California. (Est. of Boselly, 178 Cal. 715; Est. of Warner, 167 Cal. 686; Est. of Niccolls, 164 Cal. 368; Kraemer vs. Kraemer, 52 Cal. 302.)

In 1917, Sec. 164 was amended to read, "All other property acquired after marriage by either husband or wife or both, including real property situated in this State and personal property, *wherever situated*, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property." At the same session of the legislature, Secs. 172 and 172-a of the Civil Code, were respectively amended and enacted so as to require that the wife consent or join in certain conveyances and incumbrances of community property. The Supreme Court promptly held that neither of these amendments was retroactive and that community property acquired before they took effect, remained subject to the pre-existing law. (Roberts vs. Wehmeyer, 191 Cal. 601; Est. of Frees, 187 Cal. 150; Est. of Arms, 186 Cal. 554.) The Court also indicated in its decision in the Est. of Arms that it doubted the validity as well as the retroactive effect of C. C. 164, as amended in 1917, when it said "The amendment of 1917, *even if it is valid*, does not affect the case in any manner."

All this was in line with earlier views as to the retroactive effect of similar amendments, the Court having held in Spreckles vs. Spreckles, 116 Cal. 339, that the Amendment of 1891 to Sec. 172 (requiring the wife's consent to a gift or conveyance without consideration) could not be given retroactive effect, and that to do so would result in an inter-

ference with the husband's vested rights. The same conclusion was reached respecting the Amendment of 1901 which required the wife's consent in all transfers of household furnishings, clothing, etc.

However in 1923 the legislature made an effort to give retroactive effect to C. C. 164 by inserting the words, "heretofore or hereafter," after the word situated.

The validity of the section so amended came before the Court in the instant case upon the following facts:

Herman and Addie Drishaus were married in Milwaukee, Wis., in 1875. Thereafter they moved to Nebraska, where the personal property in question was acquired (except as to certain increase thereof which accrued from unused earnings of this property after they came to California). They moved to San Diego in 1916 and resided there until the husband's death in May, 1924. The Probate Court fixed the inheritance tax on this property on the basis of it being the separate property of the husband, the Court saying: "The effect of these earlier and later decisions of this Court (referring to those construing the previous amendments above referred to) cannot be held to be other than that of deciding that the vested interests which the decedent in the instant case had in the personal property brought by him to this State as his separate property and since then up to the time of his death held and owned by him as his separate property and estate, was unaffected by the foregoing amendments to the Civil Code, and that at the time of the death of said decedent the whole of said property was his separate property and estate."

There is probably nothing new or startling in this decision, following, as it does, the path marked out by the previous cases dealing with earlier amendments of a similar nature; but it serves to remind us of at least two propositions which must not be lost sight of in our every day practice.

First, while it seems to be thoroughly established as a rule of property in California, beginning with the case of Penaud vs. Jones, 1 Cal. 488, and ending (for the present at least) with Stewart vs. Stewart, 72 C. D. 244, that never in all our jurisprudence has a wife had any present vested interest in community property during the existence of the marriage relation, but only that peculiar contingent future interest which perhaps may be protected against fraudulent or unlawful transfers; and while by the same line of decisions all vested interests seem to remain in the husband during such period, nevertheless, as illustrated by Est. of Drishaus, Est. of Frees, Est. of Arms, and others, it is evident that our Court has made a distinction between the mere possession of vested rights by the husband to the exclusion of the wife, and the complete right to exercise those rights, including the power of alienation without the consent of another. If it were not for this distinction we would find the Court in the inconsistent position of declaring the husband to be fully clothed with all vested rights in community property and at the same time declaring that when his separate property is transformed into community he thereby loses vested rights therein.

Indeed it is probable that this inconsistency may be urged with considerable force in the near future, but we think it doubtful that either of these lines of decision will be changed until some new legislation or constitutional amendment arises.

Second, this decision serves to remind us that in determining community property questions we must be constantly on the alert not to apply a statute to a given set of facts until we are certain of the time and place of the acquisition of the property involved, as well as the domicile of the parties at that time. But we must go further than that; we must know when, where and how the fund was acquired with which the property was purchased, for it matters not that community property in its present form may have been acquired in California since 1917, for example, if the fund which paid for it was ac-

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Annual Meeting of California Bar Association

By THOS. C. RIDGWAY
President of California Bar Association

The largest meeting of the California Bar Association was held at Camp Curry in the Yosemite Valley on September 9, 10 and 11, 1926. It is gratifying to note that the lawyers from all sections of the State are taking a keener interest in the program and purposes of the State Association. This was evidenced by the increased attendance at the meeting and the increase in membership during the past year. The keynote of the meeting was "Simplification of Criminal and Civil Procedure, and Unification of the Bar."

The meeting opened on Thursday morning with an address of welcome by Judge E. N. Rector of Merced, which was responded to by Vice-President Charles A. Beardsley of Oakland. After the opening exercises President Shurtleff called attention to the fact that it was Admission Day and several commemorative orations were given and appropriate resolutions were telegraphed to the Native Sons in session at Sacramento.

On Thursday afternoon President Charles A. Shurtleff delivered the President's Annual Address, taking for his subject "Federal Courts in California." His address was a historical sketch of the creation of the Federal Courts in this State and the many changes that had since occurred, giving a sketch of the various judges who had occupied the Federal Bench during the period.

On Thursday evening the section on "Legal Biography" presented memorials upon Supreme Court Justices William P. Lawler and Thomas J. Lennon, and several lawyers who had passed away during the year. A paper on Rufus A. Lockwood, a prominent figure in the early California Bar, and an address on S. C. Hastings, first Chief Justice of the Supreme Court of California, were read.

On Friday morning Dr. William Draper Lewis of Philadelphia, formerly Dean of the School of Law of the University of Pennsylvania and now Director of the American Law Institute, delivered the Annual Address. His subject was "The American Law Institute and the Task of Preserving the Common Law System." Dr. Lewis created a very favorable impression and gave a very illuminating talk on the formation of the American Law Institute, the manner in which the work is done and what it had accomplished. He stated that the work thus far had been confined to Agency, Contracts, Conflict of Laws, Torts and Corporations.

Mr. Joseph J. Webb, Chairman of the Committee on Incorporation of the Bar, gave a very interesting report of the progress of the movement throughout the United States relative to the integration of the Bar, relating his experiences at the Conference of Bar Association Delegates held at Washington, D. C., on May 1st, and also at Denver on July 13th. A resolution was adopted again endorsing the proposed bill for the Incorporation of the Bar and continuing in office the same committee.

The report of the section on "Criminal Law and Procedure" was presented by its Chairman, Walter K. Tuller, who is the head of the Crime Commission for the State of California. The report created the greatest discussion on the floor of the convention. That portion of the recommendation of said section giving power to the Judge to comment on the evidence when instructing juries carried by a very narrow margin. The Association declined to approve the provision establishing a new plea known as "Not Guilty by Reason of Insanity," and the recommendation that the rulings of the court on challenges for cause be not reviewable. The provision that bail bonds be recorded and made a lien against the surety's property was referred back to the section. The provision for a verdict by less than a unanimous vote in cases involving less than the death penalty was withdrawn by Mr. Tuller.

The recommendations that were adopted by the Association may be summarized as follows:

(a) Permitting the Judge to comment to the jury on the evidence.

(b) Permitting the District Attorney to comment on the failure of the defendant to testify.

(c) The waiving of a jury trial where both defense and prosecution desire it.

(d) Appeals to be heard within 30 days after record is filed in Appellate Court, and judgments in District Courts of Appeal in criminal cases to become final in 30 days.

(Continued on Page 11)

Message of the Los Angeles Ch of of Certified Pu Ac

THE VALUE ON CERTIFIED PUB A

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ANNUAL MEETING CALIFORNIA BAR ASSOCIATION

(Continued from Page 6)

(e) Where a new trial is granted, the entire case to be reopened.

(f) Simple forms of indictment and information to be provided and an information to be filed within 15 days and all previous convictions of felony, without limitation, to be plead.

(g) A provision for giving reasonable notice of an "alibi" relied upon by defendant.

(h) Trial to be had within 30 days after entry of plea.

(i) Peremptory challenges to be equalized, 10 for each side in capital cases, and 5 in other cases.

(j) Probation not to be granted if it is known that defendant has previously been convicted of a felony or at the time of the commission of the offense was armed with a deadly weapon.

(k) Trial Judge in all cases other than where sentence is death or life imprisonment shall recommend minimum term which defendant shall serve before being eligible for parole, and where defendant is sentenced for life he shall not be eligible for parole until he has served 25 years, and where he has been previously convicted of a felony not to be eligible for parole until he has served 15 years, and where he is armed with a deadly weapon not to be eligible for parole until he has served 5 years.

(l) Habitual criminals shall be sentenced to life imprisonment.

(m) Embezzlement and Obtaining Money under False Pretences to be grouped with the crime of Larceny.

(n) Carrying a concealed deadly weapon on the person without a permit to be made a felony.

Appellate Judge Langdon advanced the proposal that decisions of the District Courts of Appeal might be given the finality of Supreme Court decisions through participation of three Justices of the Supreme Court. Action thereon was deferred.

A resolution was adopted to amend the Election Laws whereby incumbent judges might become candidates for re-election by filing a declaration of intention without the necessity of circulating and filing nomination petitions.

The action of the Executive Committee in establishing "The State Bar Journal" was ratified and a resolution was carried adopting it as the official organ of the Association and recommending its cordial support by all. This journal will be sent to every attorney in the State.

Justice Warren Olney, Jr., President of the San Francisco Bar Association, presented a Resolution providing for a Committee to present a plan for the endorsement by the Association of the best qualified candidates for position on the Appellate Courts of the State.

A proposed amendment to Section 437 of the Code of Civil Procedure was adopted which provides for a simplified answer in civil actions, consisting of a general denial.

Favorable action was taken on the Constitutional Amendments for a Judicial Council and for the Retirement of Judges.

On Friday evening the annual banquet of the Association was held, Mr. Gurney E. Newlin acting as toastmaster. Mr. Charles S. Cushing spoke on "California," Mr. Herbert Harley spoke on "The Organization of the Bar," Chief Justice Waste on "The Judiciary," Miss Florence Bishoff of Los Angeles, President of the Women's Lawyer Club, spoke on "Lawyers and Loiterers"; Kemper B. Campbell on "Dodging Diogenes," and Milton Schwartz on a subject which he eloquently avoided.

On Saturday morning the following officers were elected for the ensuing year: Thomas C. Ridgway of Los Angeles, President; Charles A. Beardsley of Oakland, Leonard B. Slosson of Los Angeles and Lewis H. Smith of Fresno as Vice-Presidents; Thomas W. Robinson of Los Angeles was re-elected Secretary; Delger Trowbridge of San Francisco, Treasurer; Joseph J. Webb and H. G. W. Dinkelspiel of San Francisco, Guy R. Crump of Los Angeles, Eugene Daney of San Diego and Law T. Frietas of Stockton, members of the Executive Committee.

The Executive Committee passed a resolution recommending that the Chairmen of all Sections and Committees meet with the Executive Committee during the winter months, at which time the various Sections and Committees will present a tentative report. The Executive Committee also passed a resolution requesting that the Officers of the Association not endorse any candidate for the Appellate or Supreme Courts or the Federal Bench, and that no action be taken by the Executive Committee upon any candidate, except pursuant to instructions from the Association or unless such candidate were the only candidate from the State of California.

COMMUNITY PROPERTY DECISIONS

(Continued from Page 4)

cumulated before that date or in another jurisdiction (if it can be traced). Also there will be cases in which we must go back through a series of transactions before we can determine which statute or amendment governs the character and disposition of the property in its present form. (Roberts vs. Wehmeyer, 191 Cal. 601; Kraemer v. Kraemer, 52 Cal. 302.)

A glance over the field of amendments to our community property statutes reveals at least the following changes, few if any of which were or are retroactive, leaving the old laws in force as to property or funds acquired prior to the respective amendments. We merely enumerate these changes as lack of time and space prohibit any discussion.

We find that the disposition of community property, upon the death of the respective spouses, has been changed at least five times to date, viz: (1) Statutes of April 17, 1850; (2) Statutes of 1861, page 311; (3) Statutes of 1863-4, page 363; (4) Civil Code 1401-1402 as enacted in 1872; (5) C. C. 1401-1402 as amended in 1923. The attempted amendment of the last named sections in 1919, having been defeated upon referendum, must be disregarded.

The power of testamentary disposition has been modified or attempted to be modified at least five times, viz: (1) Statutes of 1861, page 311; (2) Statutes of 1863-4, page 363; (3) Civil Code 1401-1402 as enacted in 1872; (4) C. C. 1401-1402 as amended in 1874; (5) C. C. 1401-02 as amended in 1923.

The method of division of community property on divorce has gone through at least four changes, viz: (1) Statutes of April 17, 1850; (2) Statutes of 1857, page 199; (3) Civil Code 146 as enacted in 1872; (4) C. C. 146 as amended in 1874.

The husband's power of alienation and control during the marriage has been modified or restricted at least four times, viz: (1) Act of April 17, 1850; re-enacted as Civil Code 172 in 1872; (2) C. C. 172, as amended in 1891; (3) C. C. 172, as amended in 1901; (4) C. C. 172 and 172-a as enacted in 1917.

Here is a total of eighteen modifications, and it is theoretically possible that in the lifetime of a couple now living any or all of these statutes might have to be examined in order to determine the status of community property now owned. This, of course, is not within the realm of practical probability but it is true that many of our present day problems do relate to transactions farther back than 1917, so that at least four distinct "ages" of legislation must be continuously dealt with by the practicing lawyer, viz: Prior to 1917; from 1917 to 1923; from 1923 to 1925; 1925 to date, and the end is not yet.

The Drishaus case also holds, incidentally, that the 1925 amendment to the Inheritance Tax Act by which it was also attempted to render that act retroactive, has no application where the death of the decedent, the order fixing the tax, and the date of perfecting the appeal, antedate the time when this amendment was approved.

Neither this decision nor any other to date discusses the validity of C. C. 164 insofar as it purports to affect the character of personal property acquired in other states by the residents thereof subsequent to the amendments of 1917 and 1923, but it would seem clear that they are likewise ineffectual in such cases. It can hardly be possible that our Court will ever declare a man to have divested himself of rights in or control over his separate property by carrying it across the California line, even though he is presumed to know that a legislative Circe is perched on her island in a sea of amendments anxious to transform his common-law title into a strange and alien form which perhaps was adequately described by the Spanish or Mexican term "Gananciales," but which has only partially been explained by seventy-seven years of common-law phraseology, scattered through nearly two hundred volumes of official reports.

Bar Association Campaign

Five candidates endorsed by the Association for Superior Court Judgeships in this County were elected at the primaries; five other candidates so endorsed by the Association must be elected at the general election. Our work is but half done.

The Bar Association's candidates for the November election are Superior Court Judges Hollzer, Burnell, and Keeler, Municipal Court Judge Westover, and Ruben Schmidt, Esq., of the Los Angeles Bar.

Candidates who have been rejected by the Association and who, under the By-Laws, must be actively opposed, are Superior Court Judge Walton J. Wood, and Messrs. Bledsoe and Crawford. The Association did not endorse or reject Municipal Court Judge Edmonds or Mr. McCartney, candidates for the unexpired term of John Perry Wood.

The Association is undertaking an energetic campaign for its ticket, and in opposition to those candidates rejected. John W. Kemp, Esq., Chairman of the Judiciary Committee, will direct the campaign; he will be assisted by an able committee from the Board of Trustees, composed of President Overton, Senior Vice-President Campbell, and Trustee Bailie. Campaign headquarters have been opened adjacent to Mr. Campbell's offices in the Chapman Bldg.; Claude I. McFadden, Esq., has been engaged as campaign manager; Miss Rosalind Bates will supervise the publicity campaign; Mr. Chas. Rittenhouse will act as organizer of districts outside of the City; Trustee Bailie has charge of the Fund Committee, which is undertaking to raise the necessary funds through personal solicitation of members throughout the City.

President Overton has just written a letter to all members of the Association, outlining the campaign and pointing out instances wherein members can render valuable assistance. The Officers and Trustees of the Association are entitled to the whole-hearted, unqualified co-operation of every single member. It is hoped that every one will help gladly and enthusiastically to elect the full Bar Association ticket.


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